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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Siskiyou)

THE PEOPLE, Plaintiff and Respondent, v. CAMRON JOSIAH DEMLING, Defendant and Appellant.	C060603 (Super. Ct. No. MCYKCRBF071783)

This case tenders issues about the Compassionate Use Act of 1996 (CUA) and the Medical Marijuana Program Act (MMPA). (Health & Saf. Code, §§ 11362.5, 11362.7 et seq.; undesignated statutory references that follow are to the Health and Safety Code.)

Peace officers found defendant Camron Josiah Demling tending a sophisticated marijuana "grow" consisting of 30 very large plants. Defendant was cooperative, and told the officers he was a qualified medical marijuana patient. He claimed ownership of six plants and said the others belonged to four other qualified patients, one of whom owned the property.

Facially valid medical marijuana recommendations for the owner, defendant, and three other patients, were posted on the premises. The officers did not find any indicia of marijuana sales on the property.

After protracted criminal proceedings, and after the trial court ruled defendant could not raise a medical marijuana defense, defendant entered into a "slow plea" in which the trial court determined guilt based on the preliminary hearing transcript. (See *Bunnell v. Superior Court* (1975) 13 Cal.3d 592.) The court found defendant maintained a place for growing marijuana. (§ 11366.5.) The court granted probation, with a stay pending appeal.

On appeal, defendant contends the trial court improperly precluded a medical marijuana defense, his motion to dismiss the information (Pen. Code, § 995) should have been granted, the trial court should have granted his motion to dismiss for destruction of evidence, and a laboratory fee should not have been imposed. The Attorney General concedes the trial court improperly precluded defendant from asserting a medical marijuana defense and the judgment must be reversed, but contends the claim of destruction of evidence is unripe and that the remaining claims are moot.

We accept the Attorney General's concession that the judgment must be reversed. We agree with defendant that we must review the motion to dismiss for lack of evidence at the preliminary hearing, but we conclude sufficient evidence was introduced to give the magistrate reasonable cause to believe

defendant had committed a crime: Although defendant claimed to be tending the plants on behalf of qualified patients, the fact they were so large, as well as defendant's partly incriminating statements, rendered the claim that this was a legitimate "grow" highly suspicious. We agree with the People that we need not adjudicate defendant's motion to dismiss for destruction of evidence, but conclude the trial court relied on an improper basis in denying the motion, and that on remand, defendant may file a renewed motion to dismiss based on destruction of evidence. Defendant's attack on the laboratory fee is moot.

We reverse with directions.

FACTS AND PROCEEDINGS

On September 7, 2007, defendant was charged by complaint with cultivation and possession for sale of marijuana, on or about October 5, 2006. (§§ 11358, 11359.)

At the preliminary hearing, the parties stipulated that on the date of arrest, October 5, 2006, defendant was found at the scene with 30 mature plants in containers, five medical marijuana recommendations, and no indicia of drug sales. After he was given his *Miranda* rights (*Miranda v. Arizona* (1966) 384 U.S. 436 [16 L.Ed.2d 694]), defendant claimed ownership of six plants, but he was not asked to identify which were his.

Sergeant John Evans testified defendant answered the door and allowed officers to make a medical marijuana "compliance check." Defendant said he had a medical marijuana recommendation, and he signed a consent-to-search form. Sergeant Evans had seen the plants the month before while on

aerial surveillance. The owner of the property was Mark Lehmann. Criminal proceedings against Mark Lehmann, a former codefendant, abated upon his death.

Detective Darrel Lemos testified defendant told him he lived in Oregon. There were 30 plants, "extremely large, very healthy. They appeared to be clones. Very good production on them." Cloning is a method to replicate a high quality plant. The plants were up to six feet high and five feet wide. They would have yielded "five pounds of processed bud per plant." Defendant admitted to the detective that they "had gotten quite large." Defendant also said "I didn't know they get that big, this is my first time growing." One of the marijuana recommendations was for Mark Lehmann, and defendant said Lehmann helped with the garden; none of the other three patients helped. Defendant had never met or spoken with those other three patients.

Detective Lemos testified that the only reason he thought defendant's medical marijuana recommendation was suspicious was because defendant was an Oregonian: He believed California residency was a legal requirement for a recommendation. Defendant told Detective Lemos that he was planning to return to Oregon after the harvest, and defendant held an Oregon driver's license. Defendant claimed six plants were his. Detective Lemos believed the amount of marijuana was excessive. Detective Lemos testified defendant's medical marijuana recommendation was a "standard" one that did not specify a quantity higher than the statutory quantity--eight ounces of processed marijuana--and

each of the plants would exceed this amount. There were "huge amounts of marijuana above and beyond personal usage."

We note that, at the time of his arrest, under the MMPA, a person was entitled to possess "no more than eight ounces of dried marijuana per qualified patient. In addition, a qualified patient or primary caregiver may also maintain no more than six mature or 12 immature marijuana plants per qualified patient." (§ 11362.77, subd. (a).) Because none of the plants had been harvested, the relevant statutory limit at the time of defendant's arrest was that each patient could have no more than "six mature plants." However, those limits have been nullified as we discuss, *infra*.

Detective Adam Zanni also testified defendant was cooperative. He found about four ounces of dried marijuana on the premises. Defendant said this was his first year growing, he thought the plants would produce about a pound each, and that he would have six pounds from his six plants, which he was planning to take back to Oregon. He had planted his six plants in the spring and came to tend them in September. Defendant had spoken to Mark Lehmann, but had not spoken to or seen the other three patients. When Detective Zanni asked defendant what he was going to do with the "excess marijuana," defendant said he did not know. Detective Zanni testified he thought only Californians could obtain California marijuana recommendations. This view, apparently, was based on a hortatory initiative statement that the CUA's aim is to benefit "seriously ill Californians" (§ 11362.5, subd. (a)), and that voluntary

identification cards referenced by the MMPA can be issued to and only to county residents (§ 11362.715, subd. (a)(1)). The prosecutor also asserted a residency requirement was implicit in the CUA and MMPA, to prevent interstate commerce in marijuana. The magistrate agreed.

The Attorney General concedes sister-state residents cannot be excluded from the medical marijuana laws, based on both statutory interpretation and equal protection grounds. Without belaboring the point, we agree.

In any event, Detective Zanni believed the grow was an "illegal co-op" because defendant told him he had never seen the other patients.

The magistrate (Kosel, J.) declined to hold defendant to answer on possession for sale, finding no evidence "that this was a commercial operation." However, he held defendant to answer on cultivation for two reasons, because defendant was not "a qualifying California resident" and "based upon the quantity of marijuana that was being grown, I'm satisfied that it does not comply with the quantity limitations in any sense of Proposition 215."

The information filed on April 29, 2008, charged defendant with cultivation of marijuana. (§ 11358.)

Defendant moved to dismiss, in part arguing that because the quantity limits set by the MMPA had recently been held unconstitutional, the theory that he possessed *too much* marijuana was invalidated.

We note that the California Supreme Court granted review of the decision concluding the MMPA quantity limits were invalid, and later held they were invalid to the extent such limits burdened a defense, but not invalid to the extent the limits were used as a "safe harbor" by qualified patients. (*People v. Kelly* (2010) 47 Cal.4th 1008, 1015-1017 & fn. 9, 1048-1049.)

The trial court (Masunaga, J.) denied the motion to dismiss for two reasons, because defendant's recommendation provided an affirmative defense at trial, not immunity, and because the "CUA only applies to California residents."

Before trial, the People moved to preclude defendant from asserting a medical marijuana defense. Judge Augustus Accurso granted the People's motion. Judge Accurso concluded he was bound by the prior rulings that, as an Oregonian, defendant could not invoke California medical marijuana laws.

This ruling led defendant to enter into a slow plea bargain. A jury was waived and the People amended the information to add a new count of unlawfully maintaining a place for growing marijuana (§ 11366.5), and to dismiss the marijuana cultivation count. The trial was conducted based on the preliminary hearing transcript. Judge Accurso found defendant guilty.

Contrary to his earlier ruling, Judge Accurso found defendant was a *Californian* when he obtained his marijuana recommendation, and found that all five recommendations "were legitimate in appearance" and that defendant was a legitimate medical marijuana patient. Judge Accurso found "the six trees

belonging to defendant were not commingled with the other 24 trees" and that there was no limit on the "growth or yield" for marijuana plants under the relevant statutes. However, Judge Accurso found defendant tended all of the plants and he was not a caregiver, therefore he was not protected by the medical marijuana laws.

Judge Accurso suspended imposition of sentence and placed defendant on probation, but issued a stay pending appeal. Defendant timely appealed.

DISCUSSION

I

The Conviction Based on the Slow Plea Must Be Reversed

The People concede defendant is entitled to a reversal because he was deprived of his right to present a medical marijuana defense. They concede a collective grow is permissible, and a person does not have to be a caregiver to lawfully help others produce marijuana.

The MMPA provides in part: "Qualified patients, persons with valid identification cards, and the designated primary caregivers of qualified patients and persons with identification cards, who associate within the State of California in order collectively or cooperatively to cultivate marijuana for medical purposes, shall not solely on the basis of that fact be subject to state criminal sanctions under Section 11357, 11358, 11359, 11360, 11366, 11366.5, or 11570." (§ 11362.775.)

Three years before defendant's trial, we held this part of the MMPA "contemplates the formation and operation of medicinal

marijuana cooperatives that would receive reimbursement for marijuana and the services provided in conjunction with the provision of that marijuana." (*People v. Urziceanu* (2005) 132 Cal.App.4th 747, 785.) We held the MMPA created a "new affirmative defense allowing collective cultivation of marijuana." (*Id.* at p. 786; see *People v. Hochanadel* (2009) 176 Cal.App.4th 997, 1008-1011, 1016-1018.) Despite that holding, the sole basis for conviction was the trial court's view that a collective grow was unlawful.

Accordingly, we accept the concession of reversible error.

II

The Motion to Dismiss for Lack of Evidence at the Preliminary Hearing

In a footnote bereft of analysis or authority, the People stated that our reversal of the conviction would moot defendant's claim that he is entitled to a dismissal because insufficient evidence was presented at the preliminary hearing. We solicited supplemental briefing on this question, and now explain why we disagree.

It is generally said that a defendant may seek review of a holding order "on appeal from a judgment of conviction, but must show prejudicial error." (4 Witkin & Epstein, Cal. Crim. Law (3d ed. 2000) Pretrial Proceedings, § 239, p. 449 (Witkin).) In part Witkin cites a case holding that, on appeal after an "error-free trial," a defendant must show how she or he was prejudiced *at that trial* by the earlier erroneous denial of a motion to dismiss based on lack of evidence at the preliminary

hearing. (*People v. Pompa-Ortiz* (1980) 27 Cal.3d 519, 527-529; see *People v. Crittenden* (1994) 9 Cal.4th 83, 136-137.)

Here, defendant does not seek reversal *because of* the earlier denial of his motion; this judgment will be reversed on another ground. Defendant is still entitled to a review of the ruling on his motion. We need only determine whether the motion should have been granted at the time the ruling was made. (See, e.g., *People v. Jones* (1998) 17 Cal.4th 279, 301.)

III

Substantial Evidence Supported the Holding Order

The California Supreme Court has discussed the standards applicable to a motion to dismiss in a medical marijuana case:

"To prevail, a defendant must show that, in light of the evidence presented to the grand jury or the magistrate, he or she was indicted or committed 'without reasonable or probable cause' to believe that he or she was guilty of possession or cultivation of marijuana in view of his or her status as a qualified patient or primary caregiver. [Citation.] '"'Reasonable or probable cause' means such a state of facts as would lead a man of ordinary caution or prudence to believe, and conscientiously entertain a strong suspicion of the guilt of the accused. 'Reasonable and probable cause' may exist although there may be some room for doubt."'" (*People v. Mower* (2002) 28 Cal.4th 457, 473, fn. omitted (*Mower*); see *Cummiskey v Superior Court* (1992) 3 Cal.4th 1018, 1026-1027.)

Based on this standard, we conclude there was sufficient evidence at the preliminary hearing to show probable cause to believe defendant was unlawfully cultivating marijuana.

First, although the five medical marijuana recommendations may not have been facially suspicious--that is, they did not appear to be forged or expired--defendant told the officers he had never met three of the other patients. That was suspicious, because in a lawful "grow," patients and caregivers would be expected to meet to discuss dividing the labor and expenses to advance the collective's production goals. (See *County of Butte v. Superior Court* (2009) 175 Cal.App.4th 729, 731.) Second, although each qualified patient may be allowed six mature plants, these plants were exceptionally large and each may have yielded over five pounds of processed marijuana. According to the testimony at the preliminary hearing, although some patients might consume this much marijuana, this is much more than is typical. Third, defendant conceded he thought each plant would yield a pound, giving him a six-pound yield, and said he did not know what he was going to do with the "excess" marijuana. Even accepting that he was only going to benefit from six plants, it can be inferred from this statement that defendant knew he would have more marijuana than he needed for his own medical purposes. Fourth, defendant claimed he had never grown marijuana before. However, he was found in charge of what officers described as a sophisticated "grow" operation, and common sense suggests it is not typical for such a valuable enterprise to be left in the hands of a rookie.

Although these facts, individually or together, do not compel the conclusion that this was an unlawful marijuana "grow" dressed up as a lawful "grow," they are sufficient to lead a person of ordinary caution or prudence conscientiously to entertain a strong suspicion that that was the case. (*Mower*, *supra*, 28 Cal.4th at p. 473.) Accordingly, the motion to dismiss for lack of evidence at the preliminary hearing was properly denied.

IV

Destruction of Evidence

Defendant contends Judge Masunaga should have granted his motion to dismiss based on a purported *Trombetta* violation. (*California v. Trombetta* (1984) 467 U.S. 479 [81 L.Ed.2d 413].) His theory was that his six plants had been marked and were therefore segregated from the other plants, but in the course of collecting and destroying the plants, the officers overlooked the segregation and destroyed all of them.

On appeal, defendant seeks an order dismissing the action, based on the purported *Trombetta* violation, or an order from this court precluding the prosecution from claiming the plants were not segregated and precluding evidence that the plants would have any particular hypothetical yield.

Judge Masunaga ruled in part: "There was no showing that the prosecution acted in bad faith or lost or destroyed evidence that might have exonerated defendant. The officers had initially determined and the court found there was sufficient

evidence that defendant was not a qualifying California resident."

On appeal, defendant emphasizes that Judge Masunaga's ruling was based on the incorrect view that defendant's residency was relevant. We agree. As stated earlier, the Attorney General concedes that defendant's residency was of no legal relevance.

It therefore appears that Judge Masunaga based her ruling on an improper theory and did not adjudicate all the facts relevant to defendant's motion, for example, the materiality of the evidence and its apparent exculpatory value. (See *People v. Catlin* (2001) 26 Cal.4th 81, 159-160.) Because it would be inappropriate to adjudicate such facts in the appellate court in the first instance, we agree with the Attorney General that defendant's claim is not ripe. We therefore do not consider the Attorney General's alternate claim that defendant's motion should have been denied in any event.

Instead, on remand, defendant may file a renewed motion to dismiss based on destruction of evidence.

V

The Laboratory Fee

Defendant concedes that reversal of his conviction moots his final claim--that a laboratory fee was not authorized. Therefore, we do not address that claim.

DISPOSITION

The judgment is reversed.

HULL, J.

We concur:

BLEASE, Acting P. J.

ROBIE, J.